84-386

NO._____

Office - Supreme Court, U.S.
FILED
OCT 15 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HARVEY D. HOLLOWAY,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

McLAIN AND HAMPTON
567 South Hull Street
Montgomery, Alabama 36104
(205) 262-0336

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HARVEY D. HOLLOWAY,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

McLAIN AND HAMPTON
567 South Hull Street
Montgomery, Alabama 36104
(205) 262-0336

QUESTIONS PRESENTED

1. Whether the conviction of the Petitioner was had upon the uncorroborated testimony of an accomplice?

2. Whether the State of Alabama may prove a Petitioner's doing of a similar criminal act as tending to show that in doing of a now-charged act that the Petitioner had that intent which is an element of the now-charged crime?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR DENIAL OF THE WRIT	10
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

	PAGE(S)
Jack v. State 364 So.2d 397, writ denied 364 So.2d 406 (Ala. 1978.....	12
Lee v. State 350 So.2d 743, 748 (Ala. Cr. App. 1977).....	12
Radke v. State 292 Ala. 290, 293 So.2d 314.....	13
Pope v. State 365 So.2d 369 (Ala. Cr. App. 1978).....	16
Whiddon v. State 53 Al. App. 280, 299 So.2d 326 (1973).....	16
McElroy's Sec. 69.01(6), C. Gamble 3d ed. 1977.....	16

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HARVEY D. HOLLOWAY,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

1. The decision of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction came without opinion on April 24, 1984. A copy of this ruling is found in Appendix "A" of the Petitioner's brief to this Court.

On July 31, 1984, the Alabama Supreme Court denied the Petitioner's petition for a writ of certioari, without opinion. A copy of said order is attached to the Petitioner's brief as Appendix "B".

JURISDICTION

The jurisdiction of this Court is invoked by the Petitioner pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing his claims under the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Petitioner alleges his claim under Code of Alabama, 1975, S 12-21-222. A copy of that statutory provision is attached to the Petitioner's brief as Appendix "D" to said petition.

STATEMENT OF THE CASE

The Petitioner, Harvey D. Holloway, was indicted, tried and convicted of trafficking in cannabis. Upon adjudication of guilt, the Trial Court sentenced the Petitioner to twenty years in the penitentiary and imposed a $25,000 fine.

The Petitioner appealed his conviction to the Alabama Court of Criminal Appeals. As set forth previously, that Court affirmed the conviction of the Petitioner without opinion. A subsequent petition for a writ of certiorari to the Alabama Supreme Court was denied without opinion.

The basic facts of this case proved that on April 2, 1982, at approximately 11:00 a.m., Johnny Grant and James Buttram, of the Etowah County Sheriff's Department and the A.B.C. Board respectively, were conducting surveillance on the house located at 308 Clark Street

in Gadsden, Alabama. During the surveillance, the two law enforcement officials observed a 1975 Buick automobile arrive at the residence under surveillance. The vehicle was being driven by one Billy Martin Bolding, with the passenger of that vehicle being the Defendant, Harvey D. Holloway.

The Defendent was observed getting out of the car and walking up to the housetrailer located at the above-stated address. Shortly thereafter, the Defendant came out of the home accompanied by two other men. The two men with the Defendant got into a 1971 Plymouth automobile. The Defendant and Bolding got back into the Buick automobile and followed the Plymouth. Officers Grant and Buttram followed these two vehicles in their surveillance automobile to an address at 404 Noojin Court.

At this address, several people were observed coming out of the house and going to the car in which Bolding and the Defendant were seated. Someone took the keys to the car from

Bolding and then went to the rear of the vehicle and opened the trunk. The men took out two large, white bags and placed them in the trunk of the Plymouth. Then one of the men went inside the house and came back with a small bowl which he took to the trunk of the car. Then the two men got back into the Plymouth automobile and left the scene. The officers then observed the Defendant and three other people go back inside the house at this address.

Officer Grant left and went to the Courthouse to obtain a search warrant. The search warrant provided for the search of the automobiles and premises located at the address in question. Shortly thereafter, the Plymouth automobile returned and the two men riding in this automobile went inside the house. The Defendant and another man then came out of the house and got into the Buick and left the scene. The search warrant was executed at the house and revealed nothing inside the residence. One

of the individuals inside the house, a Mr. James Carter, told the police officers executing the search warrant that the Plymouth automobile was his. Carter then gave the keys to said automobile to the police officers.

The police officers found the two bags of marijuana in the small bowl which also contained marijuana in the trunk of the Plymouth. The individuals involved were transported to police headquarters. Officer Grant took the marijuana into custody as evidence. Statements were taken of some of the people involved by the police officers.

Bolding, the driver of the automobile in which the Defendant was seated when observed by law enforcement officers earlier, testified in Court that the 1975 Buick automobile was his. He also testified that the Defendant was contacted by him to get a part for one of his trucks. The Defendant had told Bolding that he would be happy to help Bolding procure the part

necessary for his truck. The Defendant came to Bolding's house on the evening prior to their departure for Gadsden. The Defendant put the two bags of marijuana in the trunk of Bolding's automobile. Bolding testified that he observed the Defendant take the marijuana out of the Defendant's car and place it in Bolding's automobile. When questioned as to how he know the marijuana was in fact marijuana, Bolding testified that the Defendant had previously told him that the substance in the sacks was marijuana.

Bolding testified that theDefendant then directed him to the trailer located at 308 Clark Street. Once the Defendant and Bolding arrived at this location the Defendant got out of the car and went inside the trailer. The Defendant then came out of the trailer with some other men who got into another car which the Defendant then directed Bolding to follow. Bolding stated that when he got to the house in question, the two men came to him to get

his keys and took the bags out of the trunk of Bolding's car. Bolding further testified that the Defendant had paid Bolding's attorney's fees and arranged for his bond subsequent to Bolding's arrest on this drug charge.

Officer Buttram testified as to the facts which were also testified to by Officer Grant. Both of these officers' testimony affirmed the facts as to the Defendant's participation in this drug.scheme. Officer Grant also testified to the effect that he had received information concerning drug activity at this address from a confidential, reliable informant.

REASONS FOR DENIAL OF THE WRIT

I

The conviction of the Petitioner was not solely upon the uncorroborated testimony of an accomplice. The Petitioner contends to this Court his conviction was had solely upon the uncorroborated testimony of an accomplice in violation of Code of Alabama, 1975, S 12-21-222. The Respondent, State of Alabama, would submit that the evidence presented by the State at the trial of this Petitioner consisted of more than the accomplice's testimony of Bolding which the Petitioner now urges was the basis of the conviction. The State offered not only the testimony of Bolding but also the testimony of the two law enforcement officers involved, Johnny Grant and James Buttram. Both of these officers testified that they personally observed the Petitioner at the scene of the drug transactions and observed the Defendant's active participation in this illegal activity.

As stated previously, these two officers

testified that they saw the Petitioner in Bolding's automobile when it arrived at 308 Clark Street. The Petitioner got out of the automobile and went to the house trailer located at this address. Shortly thereafter, the Petitioner came out of the trailer with two other men. Those two men got into another automobile which was then followed by the Petitioner and Bolding in Bolding's automobile. When the two cars arrived at 404 Noojin Court, the people in the Plymouth automobile got Bolding's keys from him and then took the marijuana from the trunk of Bolding's car and placed it in the Plymouth.

The evidence therefore showed that the Petitioner had placed the marijuana in Bolding's vehicle prior to the trip to Gadsden. The Petitioner had told Bolding that the bags contained marijuana. The law enforcement officers observed the bags being removed from Bolding's car by the other people who were a part of this conspiracy.

It has been held in the Appellate Courts of the State of Alabama that the evidence corroborated the testimony of an accomplice in a criminal prosecution need not be strong, nor sufficient in or of itself to support a conviction. The sufficiency of such evidence is tested by whether it legitimately tends to connect the accused with the offense. Jacks v. State, 364 So.2d 397, writ denied, 364 So. 2d 406 (Ala. 1978). That case also stands for the proposition that both circumstantial and direct evidence are competent to connect a criminal Defendant independently with the crime about which the accomplice has testified.

The law of Alabama requires in a criminal prosecution such as this that the State prove three essential elements: (1) actual or potential physical control; (2) intention to exercise dominion; (3) external manifestation of intent and control. Lee v. State, 350 So.2d 743, 748 (Ala. Cr. App. 1977). The evidence presented by the State of Alabama in the instant

case showed that the Petitioner had actual physical possession and control of the bags of marijuana in question. This possession is further evidence of the Petitioner's intent to exercise dominion over the controlled substance. It is submitted that the actual possession of the substance by the Petitioner was an external manifestation of his intent. On these facts, the conclusion would be that the evidence presented fulfill the essential elements necessary for proof of possession for a prosecution for such crime in the State of Alabama.

Further, when the presence of the accused at the scene of the crime is established along with the evidence of his knowledge of the presence of a prohibited substance, which can be shown circumstantially, then the issue of a criminal defendents' guilt should be submitted to the jury. Radke v. State, 292 Ala. 290, 293 So. 2d 314. The testimony of the law enforcement officers conducting surveillance

established the presence of the Petitioner at the scene of the drug transactions. Further facts and testimony established that the Petitioner was in physical possession of the contraband and participated actively in the trafficking of the contraband in question.

The evidence presented by the State did not consist solely of the testimony of the Petitioner's accomplice. Rather testimony of the two law enforcement officers conducting surveillance and their observations at the scene of the drug transactions placed the Defendant at the scene of said crime and confirmed his participation in the crimes as testified to by Bolding. The facts of the case were more than sufficient to submit the issue of the Petitioner's guilt or innocence to the jury. The Petitioner has failed to demonstrate to this Court a factual basis for his allegation that this conviction was had solely upon the uncorroborated testimony of an accomplice.

II

THE STATE MAY PROVE A PETITIONER'S DOING OF A SIMILAR CRIMINAL ACT AS TENDING TO SHOW THAT IN DOING OF A NOW-CHARGED ACT HE HAD THAT INTENT WHICH IS A NECESSARY ELEMENT OF THE NOW-CHARGED CRIME.

The second issue urged by the Petitioner as a basis for his petition is that the Trial Court committed reversible error in allowing the State to show that the Petitioner had been arrested for possession of marijuana on a previous case. At the trial of the Petitioner, the District Attorney stated to the Court, and on the record, that this particular evidence was being offered solely for the purpose of proving the common plan, scheme and design of a criminal defendant.

At the trial of his case, the Petitioner had taken the stand and flatly denied that he had in any way participated in this illegal drug transaction. On rebuttal, the State was then allowed to prove that an automobile

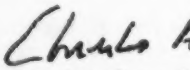
supposedly belonging to the Petitioner was discovered to contain marijuana. As set forth in Part I of this brief, intent is a material element of the crime of possession charge which was being tried against this Petitioner. The law of Alabama states that the prosecution may show, in cases concerning crimes that require prerequisite intent, prior criminal acts of the Defendant to show that he had the necessary intent when the committed the now-charged crime. Pope v. State, 365 So.2d 369 (Ala. Cr. App. 1978). And in certain crimes, the State may prove the accused's doing of similar acts as tending to show that in doing of a now-charged act, the accused had that intent that is an element of the now-charged crime. Whiddon v. State, 53 La. App. 280, 299 So.2d 326 (1973). The Respondent would submit that testimony concerning the similar, prior misconduct of the Petitioner was therefore admissible. McElroy's Sec. 69.01(6), C. Gamble 3d ed. 1977.

Finally, Respondent would submit that there was no objection voiced by defense counsel at the time this particular testimony was offered. Under the laws of this state, a specific objection is required. Defense counsel's general objection which was previously voiced to this type of question failed to preserve that issue for the Appellate Court's review.

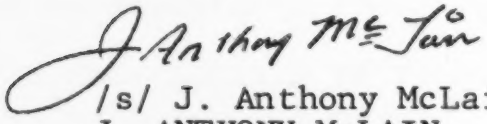
CONCLUSION

Based on the foregoing argument the Respondent would submit that the writ of certiorari requested by the Petitioner in this case is due to be denied.

Respectfully submitted,



/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA



/s/ J. Anthony McLain
J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
ALABAMA

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the 11th day of October, 1984, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for Petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows:

Honorable Arthur J. Hanes, Jr.
933 Frank Nelson Building
Birmingham, Alabama 35203

Honorable Virginia A. Vinson
617 Frank Nelson Building
Birmingham, Alabama 35203

/s/ J. Anthony McLain
J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
ALABAMA

McLain and Hampton
567 South Hull Stteet
Montgomery, Alabama 36104
(205) 262-0336